



SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245-AH71

Past Performance Ratings for Small Business Joint Venture Members and Small Business First-Tier Subcontractors

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The Small Business Administration is proposing to amend its regulations to implement new provisions of the National Defense Authorization Act (NDAA) Fiscal Year 2021 (FY 2021). The proposed rule would provide new methods for small business government contractors to obtain past performance ratings to be used with offers on prime contracts with the Federal Government. A small business contractor may use a past performance rating for work performed as a member of a joint venture or for work performed as a first-tier subcontractor. This proposed rule updates the requirements for small business subcontracting plans to add a requirement for prime contractors to report past performance to a first-tier, small business subcontractor when requested by the small business that was a first-tier subcontractor.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN: 3245-AH71, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Email: Donna Fudge, Procurement Analyst, Office of Policy Planning and Liaison, Small Business Administration, at Donna.Fudge@sba.gov.

SBA will post all comments on <https://www.regulations.gov>. If you wish to submit confidential business information (CBI), as defined in the User Notice at <https://www.regulations.gov>, please submit the information to Donna Fudge, Small Business Administration at Donna.Fudge@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Donna Fudge, Procurement Analyst, Office of Policy Planning and Liaison, Small Business Administration, at Donna.Fudge@sba.gov, (202) 205-6363.

SUPPLEMENTARY INFORMATION:

I. Background Information

Section 868 of NDAA FY21, Public Law 116-283, addresses a common obstacle that small businesses may face when competing for prime Federal Government contracts: possessing qualifying past performance. The proposed rule implements section 868 by providing small businesses with two new methods for obtaining qualifying past performance. First, a small business may use the past performance of a joint venture of which it is a member, provided that the small business worked on the joint venture's contract or contracts. Second, a small business may use past performance it obtained as a first-tier subcontractor on a prime contract with a subcontracting plan. For this latter method, section 868 authorizes the small business to seek a past performance rating from the prime contractor and submit the rating with the small business' offer on a new prime contract.

Section 868 added a new section 15(e)(5) to the Small Business Act, 15 U.S.C. 644(e)(5), to address past performance ratings of joint ventures for small business concerns. A small business concern that previously participated in a joint venture with

another business concern (whether or not the other concern was small) may use the past performance of the joint venture with the small business' offer on a prime contract. Section 15(e)(5) directs SBA to establish regulations to allow the small business to elect to use the joint venture's past performance if the small business has no relevant past performance of its own. The small business must: (i) identify to the contracting officer the joint venture of which the small business was a member; (ii) the contract(s) of the joint venture the small business elects to use; and (iii) inform the contracting officer what duties and responsibilities the small business carried out as part of the joint venture. In turn, the contracting officer shall consider the past performance of the joint venture when evaluating the past performance of the small business concern, giving due consideration to the information submitted about the duties and responsibilities that the small business carried out.

To address first-tier small business subcontractors, section 868 amended section 8(d)(17) of the Small Business Act, 15 U.S.C. 637(d)(17), which previously discussed a pilot program to provide past performance ratings for other small business subcontractors. Under the section 868 program, small business concerns may obtain past performance ratings for performance as a first-tier subcontractor on a prime contract that included a subcontracting plan. The proposed rule would require the prime contractor on the prime contract to provide a rating of the small business's past performance with respect to that prime contract to the small business within 15 days of the request. If the small business elects to use the past performance rating, the contracting officer shall consider the past performance rating when evaluating the small business's offer on a prime contract.

Because section 868 replaced the prior pilot program in section 8(d)(17), SBA will no longer pursue the pilot program as described in 83 FR 17583. This proposed rule creates a separate mechanism for first-tier subcontractors to obtain past performance

ratings. The Federal Acquisition Regulation (FAR) rule implementing this requirement will account for the information collection, and clearance for the information collection will be obtained by the FAR Council.

SBA requests comments on whether small business subcontractors have been negatively impacted in competing for prime contracts due to not having a past performance rating(s).

SBA also seeks comment on whether to prescribe a time frame within which the subcontractor must make a request to the prime contractor for a rating under this proposed rule. If the prime contractor is currently in the period of performance for its contract, the prime contractor would be bound by its subcontracting plan to respond to the subcontractor's request. After the period of performance, however, the prime contractor would not necessarily be required to respond, because the contract would have ended. SBA seeks comment on whether to recommend that a subcontractor submit its request for a rating within the period of performance of the prime contractor's contract. If there might be a reasonable period of time after the physical completion of the prime contractor's contract in which the subcontractor should or must submit its request, SBA seeks comment on how to implement that time period into the prime contractor's Federal contract and what the time period might be. SBA also seeks comment on if the prime contractor and subcontractor might negotiate time periods and procedures by which the subcontractor can request a rating, and, if so, how to recognize that ability to negotiate in this regulatory prescription. In particular, should SBA recommend that the subcontractor negotiate the procedures for submitting a request and the time frames?

II. Section-by-section analysis

13 CFR 125.3

This proposed rule would add a requirement to prime contractors' subcontracting plans. The subcontracting plan will require the prime contractor to provide a rating of a

first-tier subcontractor's past performance within 15 days of the first-tier subcontractor's request. The requested rating would be prepared to include, at a minimum, the following evaluation factors in the requested rating: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; and (e) Other (as applicable).

13 CFR 125.11

This proposed rule renumbers 13 CFR 125.11 and subsequent sections to create a new § 125.11. New § 125.11(a) provides general guidance to require agencies to consider the past performance of certain small business offerors that have been members of joint ventures or first-tier subcontractors. The remainder of this proposed rule addresses the two scenarios from NDAA 2021.

First, a small business concern may receive past performance consideration for the past performance of a joint venture of which the small business was a member. To receive past performance consideration, where the small business does not independently demonstrate past performance necessary for award, the small business may elect to use the joint venture's past performance and the contracting officer shall consider the joint venture past performance that the small business has elected to use. In its offer for a prime contract, the small business must identify: (i) the joint venture; (ii) the contract(s) of the joint venture that the small business elects to use; and (iii) describe to the agency what duties or responsibilities the small business carried out as a joint venture member. The small business cannot, however, claim past performance credit for work performed exclusively by other partners to the joint venture.

As required by NDAA 2021, the contracting officer shall consider the information that the small business provided about its duties and responsibilities carried out as part of the joint venture. Where the small business does not independently demonstrate past

performance necessary for award, agencies shall consider a small business' successful rating of past performance through a joint venture. For example, a solicitation might require three past performance examples. This proposed rule would authorize the small business offeror to submit two examples from performance in its own name and one example from performance of a joint venture of which it was a member if the small business cannot independently provide the third example of past performance on its own. This proposed rule provides that the joint venture's past performance may supplement the relevant past performance of the small business when the small business cannot independently demonstrate the past performance on its own.

Second, a small business concern may receive past performance consideration for performance as a first-tier subcontractor. NDAA FY21 directs that this mechanism is limited to small businesses that performed as first-tier subcontractors on contracts that include subcontracting plans. The small business may request a rating of its subcontractor past performance from the prime contractor. Under the proposed rule, the prime contractor must provide a rating to the requesting small business within 15 days of the request.

Under this proposed rule, the requested rating would be prepared to include, at a minimum, the following evaluation factors in the requested rating: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; and (e) Other (as applicable). The proposed rule clarifies that one scenario where this applies is where the small business lacks a rating in the Contractor Performance Assessment Reporting System (CPARS). In that case, the agency shall consider the small business's subcontractor past performance rating as being equivalent to a CPARS rating.

This proposed rule clarifies that a joint venture composed of small businesses may receive past performance consideration for work that the joint venture performed as a first-tier subcontractor. A small business member of the joint venture subcontractor may request a past performance rating from the prime contractor for a contract that included a subcontracting plan. The prime contractor must provide the requested rating to the joint venture member within 15 days of the request. The requested rating would be prepared to include, at a minimum, the following evaluation factors in the requested record:

- (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);
- (c) Schedule/timeliness; (d) Management or business relations; (e) Other (as applicable).

The small business could then use that rating to establish its past performance in accordance with the prior provision on submitting joint venture past performance.

13 CFR 125.28

SBA is proposing to change the reference from §125.15(a) to §125.18(a) everywhere it appears in this section due to renumbering of sections. Section 125.18(a) provides the requirements for representation of service-disabled veteran-owned (SDVO) small business status.

13 CFR 125.29

SBA is proposed to change the reference from §125.8 to §125.12 everywhere it appears in this section due to renumbering of sections. Section 125.12 provides the definitions that are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) program.

13 CFR 125.30

SBA is proposing to change the reference from §125.8 to §125.12 everywhere it appears in this section due to renumbering of sections. Section 125.12 provides the definitions that are important in the SDVO SBC program.

III. Compliance with Executive Orders 12866, 12988, 13132, 13175, 13563, the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis.

1. Regulatory Impact Analysis: Is there a need for the regulatory action?

This rule is necessary to satisfy statutory requirements to implement section 868 of National Defense Authorization Act of Fiscal Year 2021 (NDAA FY21). Section 868 (e) requires the Administrator to issue rules to carry out the section.

Absence of past performance has been a limitation for small businesses when pursuing procurement opportunities that evaluate past performance. Small businesses often have past performance through work performed as a joint venture partner or as a subcontractor, but this experience and past performance is often not acknowledged or credited to the relevant small business in the evaluation process. This proposed rule is necessary to address that shortcoming in the evaluation of past performance and experience.

The FAR states that "past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold." See FAR 15.304(c)(3). Past performance is "one indicator of an offeror's ability to perform the contract successfully." See FAR 15.305(a)(2). FAR 15.302(a)(2)(iv) provides that, in the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance. Because past performance may be considered a

responsibility factor or because past performance affects an offeror's evaluation as compared to other offerors, the ability of small businesses that have been first-tier subcontractors or participated in joint ventures to demonstrate past performance increases their competitiveness in Federal contracting.

2. What is the baseline, and the incremental benefits and costs of this regulatory action?

OMB directs agencies to establish an appropriate baseline to evaluate any benefits, costs, or transfer impacts of regulatory actions and alternative approaches considered. The baseline should represent the agency's best assessment of what the world would look like absent the regulatory action. For a regulatory action that modifies or replaces an existing regulation, a baseline assuming no change to the regulation generally provides an appropriate benchmark for evaluating benefits, costs, or transfer impacts of proposed regulatory changes and their alternatives. This proposed rule would implement the changes, by modifying and expanding, the rating procedures of the unimplemented pilot program in 8(d)(17) of the Small Business Act (15 U.S.C. 637(d)(17)), which was added by section 1822 of the National Defense Authorization Act of 2017.

NDAA FY21 amended Section 8(d)(17) of the Act to allow small businesses that performed as first tier subcontractors to request a past performance rating from the prime contractor. The prime contractor must provide a rating of the small business past performance with respect to that prime contract to the small business within 15 days of the request. The requested rating would be prepared to include, at a minimum, the following evaluation factors in the requested rating: (a) Technical (quality of product or service); (b) Cost control (not applicable for firm-fixed price or fixed-price with economic price adjustment arrangements); (c) Schedule/timeliness; (d) Management or business relations; (e) Other (as applicable). This proposed rule would modify the pilot program, in which a small business that had not performed as a prime contractor could

request a past performance rating in the Contractor Performance Assessment Reporting System (CPARS), if the small business is a first tier subcontractor under a covered Federal Government contract requiring a subcontracting plan. Section 868(a) amends Section 15(e) of the Small Business Act to direct the establishment of regulations that allow the use of past performance in joint ventures in Federal contracting offers. This amendment expands the opportunities for past performance consideration by including consideration of the past performance of a joint venture of which the small business was a member.

The baseline is that which exists without implementation of the pilot program in section 8(d)(17) of the Small Business Act. In this environment, when a Federal agency creates a procurement opportunity requiring an offeror to provide examples of past performance, a newer small business concern may forego the opportunity because it individually lacks the required number of examples and then opt to join an established prime contractor's team as a subcontractor.

The most significant benefit of this proposed rule to small businesses is that it would enhance of the small businesses' ability to compete in Federal contracting opportunities. The FAR states that "past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold." See FAR 15.304(c)(3)(i). FAR 15.302(a)(2)(iv) provides that, in the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance. Nevertheless, small businesses without past experience as prime contractors may forego seeking some Federal contracting opportunities. This enhancement of Federal contracting opportunities is consistent with the amendment of the Small Business Act, which states that "procurement strategies used by a Federal

department or agency having contract authority shall facilitate the maximum participation of small business concerns as prime contractors, subcontractors, and suppliers.” 15 U.S.C. 644(e)(1).

With more small businesses able to demonstrate past performance, agencies will have a larger pool of small businesses competing for contracting opportunities. This added competition may result in lower prices to the Government. SBA cannot quantify this impact before proposal of applicable FAR rules.

Costs of this proposed rule to the private sector include the prime contractor’s provision, upon request to provide a past performance rating. The time burden of this requirement to the prime contractor is similar to that of the pilot program’s past performance rating requirement. SBA estimates the fulfillment of a past performance request to require about 30 minutes of time. Assuming that a compilation of a rating of past performance involves 30 minutes of work by an employee of the prime contractor and valuing the time at \$93.44 per hour,¹ SBA estimates that each rating request costs a prime contractor \$46.72 in labor plus de minimis costs of transmission of the rating. There were approximately 34,000 individual subcontracting plans with 24,000 at the prime contract level in fiscal year 2015 (81 FR 94249), but it is not known how many small businesses were involved in these subcontracting plans or how many small businesses were involved in multiple subcontracting plans. SBA notes that 1,461 small businesses have active SBA-approved Mentor-Protégé agreements.² SBA also notes that

¹ The median hourly wage for construction managers is \$46.72, according to 2020 Bureau of Labor Statistics (BLS) data, and the hourly rate of \$93.44 includes 100 percent more for benefits and overhead. Source for hourly rate: <https://www.bls.gov/ooh/management/construction-managers.htm>. Retrieved June 8, 2021.

² One of the goals of the SBA’s Mentor-Protégé program is to promote the ability of small protégé businesses to successfully compete for government contracting opportunities. Protégé small businesses often form joint ventures with their mentors to pursue specific procurement requirements in order to gain experience and be able independently perform similar requirements in the future.

in FY2019, the Electronic Subcontracting Reporting System (eSRS) listed 2,082 commercial plans with small businesses.

Assuming that half, or 731, of the small businesses with active agreements in the Mentor-Protégé program request a rating of past performance each year, the annual cost to the private sector of fulfilling these requests for past performance ratings would be \$34,152 plus de minimis costs. Assuming that small businesses with 10 percent of 24,000 subcontracting plans at the prime contract level, in addition to those in the Mentor-Protégé program, request a rating of past performance each year, the annual cost to the private sector of fulfilling these requests is \$112,128. Assuming each of the 2,082 commercial plans has two to four subcontracts, and half of the total subcontracts represents small business that would request a past performance rating each year, then the annual cost to the private sector of fulfilling these requests would be \$145,907 plus de minimis costs. With these assumptions, total annual costs to the private sector of fulfilling requests is \$292,187 plus de minimis costs.

The requirement of small business offerors that have been members of joint ventures to identify the joint venture, identify the contract(s) of the joint venture, and describe duties or responsibilities as a joint venture member in order to receive consideration of past performance involves a resource cost to the small business offerors that compile the specified information. SBA notes that this cost would be voluntarily incurred by small businesses that assess the enhancement of Federal contracting opportunities from consideration of past performance to be of greater value than the incremental costs incurred.

If more small businesses meet past performance standards and then submit proposals to contracting agencies, administrative costs to the Government may increase when a contracting agency reviews an increased number of proposals and past

performance ratings. SBA cannot quantify these costs and notes that increased competition may offset these costs to the Government.

The ability of more small businesses to demonstrate past performance may redistribute some Federal contracts from businesses that can demonstrate past performance in the baseline scenario that exists with no implementation of the pilot program. This redistribution would not affect overall economic activity. This proposed rule and its effects do not change the amount of dollars in all available Federal contracts. SBA cannot quantify the actual outcome of the gains and losses from the redistribution of contracts among different groups of small businesses that would result from an increased number of small businesses with the ability to demonstrate their experience and past performance, but it expects that competition from small businesses with newly established past performance ratings may displace some small businesses that had established ratings in Federal contracting opportunities. A partial offset of this transfer impact among small businesses may occur with increased numbers of contracts set aside for small businesses through the Rule of Two, which states there is a reasonable expectation that the contracting officer will obtain offers from at least two small businesses and award will be made at fair market price.

3. What are the alternatives to this rule?

This proposed rule would implement specific statutory provisions in Section 868 of the NDAA FY21. There are no alternatives that would meet the statutory requirements.

Executive Order 12988

This proposed rule meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

This proposed rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive order. As such it does not warrant the preparation of a Federalism Assessment.

Executive Order 13175

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13563

This Executive order directs agencies to, among other things: (a) Afford the public a meaningful opportunity to comment through the internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an “open exchange” of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considers these requirements in developing this rule, as discussed below.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 12866 (e.g., identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

To the extent possible the agency utilized the most recent data available in the Federal Procurement Data System-Next Generation, System for Award Management, and Electronic Subcontracting Reporting System.

2. Public participation: Did the agency: (a) Afford the public a meaningful opportunity to comment through the internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an “open exchange” of information among Government officials, experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on Regulations.gov; and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?

The proposed rule will have a 60-day comment period and will be posted on www.regulations.gov to allow the public to comment meaningfully on its provisions.

3. Flexibility: Did the agency identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public?

Yes, the proposed rule implements statutory provisions that provide new methods for small business government contractors to obtain past performance ratings to be used with offers on prime contracts with the Federal Government. The proposed rule would update the requirements for small business subcontracting plans to add a requirement for prime contractors to report past performance to a small business, first-tier subcontractor when requested by the small business first-tier subcontractor. The proposed rule will enhance the small business’ ability to compete for Federal Government prime contracting opportunities.

Paperwork Reduction Act

This rule, if adopted in final form, would update the requirements for small business subcontracting plans to add a requirement for prime contractors to report past performance to a small business, first-tier subcontractor when requested by the small

business first-tier subcontractor. The FAR rule implementing this requirements will account for this information collection, and clearance for the information collection will be obtained by the FAR Council.

In this proposed rule, SBA also proposes that a small business concern may receive past performance consideration for the past performance of a joint venture of which the small business was a member. This does not require a new information collection because the Government contracting officer rates the joint venture entity.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines “small entity” to include “small businesses,” “small organization,; and “small governmental jurisdictions.”

This proposed rule provides new methods for small business contractors to obtain past performance ratings to be used with offers on prime contracts, as such the rule relates to small business concerns but would not affect “small organizations” or “small governmental jurisdictions” because those programs generally apply only to “business concerns” as defined by SBA regulations, in other words, to small businesses organized for profit. “Small organizations” or “small governmental jurisdictions” are non-profits or governmental entities and do not generall qualify as “business concerns” within the meaning of SBA’s regulations.

There are approximately 1,431 active SBA-approved Mentor-Protégé agreements and SBA estimates that half, or 731, small businesses with active agreements would request a past performance rating from its prime contractor in a year. Of the 24,000 subcontracting plans at the prime contract level in fiscal year 2015, SBA assumes for this analysis that up to 2,400 that are not in the Mentor-Protégé program may request a past performance rating each year. Additionally, in FY2019 there were 2,082 commercial plans with small businesses. Assuming two to four subcontracts for each commercial plan, and half of them request a past performance rating, SBA estimates that up to 3,123 small businesses involved in commercial plans may request a past performance rating each year. The proposed changes allow small business contractors to request a past performance rating from a prime contractor for whom they performed work as a first-tier subcontractor or as a member of a joint venture. In addition, the proposed rule updates the requirements for small business subcontracting plans to add a responsibility for prime contractors to report past performance of the first-tier when requested by that first-tier subcontractor.

As a result, SBA does not believe the proposed rule would have a disparate impact on small businesses or would impose any additional significant costs. For the reasons discussed, SBA certifies that this proposed rule would not have a significant economic impact on a substantial number of small business concerns.

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Small business subcontracting.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR part 125 as follows:

PART 125—GOVERNMENT CONTRACTING PROGRAMS

1. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657f, 657q, 657r, and 657s; 38 U.S.C. 501 and 8127.

2. Amend § 125.3 by:

a. Removing the word “and” at the ends of paragraphs (c)(1)(ix) and (x);

b. Removing the period at the end of paragraph (c)(1)(xi) and adding “; and” in its place; and

c. Adding paragraph (c)(1)(xii).

The addition reads as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

* * * * *

(c) * * *

(1) * * *

(xii)(A) The prime contractor, upon request from a first-tier small business subcontractor, shall provide the subcontractor with a rating of the subcontractor’s past performance. The prime contractor must provide the small business subcontractor the requested rating within 15 days of the request. If the subcontractor will use the rating for an offer on a prime contract it must include, at a minimum, the following evaluation factors in the requested rating:

(1) Technical (quality of product or service);

(2) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);

(3) Schedule/timeliness;

(4) Management or business relations; and

(5) Other (as applicable).

(B) The requirement in paragraph (c)(1)(xii)(A) of this section is not subject to the flowdown in paragraph (c)(1)(x) of this section.

* * * * *

§§ 125.11 through 125.14 [Redesignated as §§ 125.12 through 125.15]

3. Redesignate §§ 125.11 through 125.14 as §§ 125.12 through 125.15.4. Add new § 125.11 before subpart A to read as follows:

§ 125.11 Past performance ratings for certain small business concerns.

(a) *General.* In accordance with sections 15(e)(5) and 8(d)(17) of the Small Business Act, agencies are required to consider the past performance of certain small business offerors that have been members of joint ventures or have been first-tier subcontractors. The agencies shall consider the small business' past performance for the completion of the performance of the evaluated contract or order.

(b) *Small business concerns that have been members of joint ventures—(1) Joint venture past performance.* (i) When submitting an offer for a prime contract, a small business concern that has been a member of a joint venture may elect to use the experience and past performance of the joint venture (whether or not the other joint venture partners were small business concerns) where the small business does not independently demonstrate past performance necessary for award. The small business concern, when making such an election, shall:

(A) Identify to the contracting officer the joint venture of which the small business concern is or was a member;

(B) Identify the contract or contracts of the joint venture that the small business elects to use for its experience and past performance for the prime contract offer; and,

(C) Inform the contracting officer what duties and responsibilities the concern carried out or is carrying out as part of the joint venture.

(ii) A small business cannot identify and use as its own experience and past performance work that was performed exclusively by other partners to the joint venture.

(2) *Evaluation.* When evaluating the past performance of a small business concern that has submitted an offer on a prime contract, the contracting officer shall consider the joint venture past performance that the concern elected to use under paragraph (b)(1) of this section, giving due consideration to the information provided under paragraph (b)(1)(i)(C) of this section for the performance of the evaluated contract or order. This includes where the small business concern lacks a past performance rating as a prime contractor in the Contractor Performance Assessment Reporting System, or successor system used by the Federal Government to monitor or rate contractor past performance.

(c) *Small business concerns that have performed as first-tier subcontractors—(1) Responsibility of prime contractors.* A small business concern may request a rating of its subcontractor past performance from the prime contractor for a contract on which the concern was a first-tier subcontractor and which included a subcontracting plan. The prime contractor shall provide the rating to the small business concern within 15 days of the request. The prime contractor must include, at a minimum, the following evaluation factors in the requested rating:

- (i) Technical (quality of product or service);
- (ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);
- (iii) Schedule/timeliness;
- (iv) Management or business relations; and
- (v) Other (as applicable).

(2) *Joint ventures that performed as first-tier subcontractors.* A small business member of a joint venture may request a past performance rating under paragraph (c)(1) of this section, where a joint venture performed as a first-tier subcontractor. The joint

venture member may then submit the subcontractor past performance rating to a procuring agency in accordance with paragraph (b) of this section.

(3) *Evaluation.* When evaluating the past performance of a small business concern that elected to use a rating for its offer on a prime contract, a contracting officer shall consider the concern's experience and rating of past performance as a first-tier subcontractor and that is within three years (six for construction and architect-engineering) of the completion of performance of the evaluated contract or order. This includes where the small business concern lacks a past performance rating as a prime contractor in the Contractor Performance Assessment Reporting System, or successor system used by the Federal Government to monitor or rate contractor past performance.

§ 125.28 [Amended]

5. Amend § 125.28(a) by removing “§ 125.15(a)” and adding “§ 125.18(a)” in its place.

§§ 125.29 and 125.30 [Amended]

6. In addition to the amendments set forth above, in 13 CFR part 125, remove “§ 125.8” and add “§ 125.12” in its place in the following places:

- a. § 125.29(a); and
- b. § 125.30(g)(4).

Isabella Casillas Guzman,
Administrator.

[FR Doc. 2021-25002 Filed: 11/17/2021 8:45 am; Publication Date: 11/18/2021]